

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

SCOTT ALLEN FISCHER,

Petitioner,

v.

JEFFEREY PERKINS,

Respondent.

CASE NO. 2:25-cv-00794-BHS-GJL

REPORT AND RECOMMENDATION

Noting Date: **May 27, 2025**

The District Court has referred this 28 U.S.C § 2254 habeas action to United States Magistrate Judge Grady J. Leupold. Petitioner Scott Allen Fischer, proceeding *pro se*, has paid the filing fee and filed a federal habeas Petition. Dkt. 1. Upon review, the undersigned concludes the Petition is an unauthorized successive petition for which this Court lacks jurisdiction.

Accordingly, the undersigned **DECLINES** to order service upon Respondent pursuant to Rule 4 of the Rules Governing § 2254 cases (“Habeas Rules”) and, instead, recommends the Petition (Dkt. 1) be **DISMISSED without prejudice**.

**I. BACKGROUND**

Petitioner, who is currently in custody at Coyote Ridge Corrections Center, challenges his state court conviction for aggravated murder and resulting life sentence of imprisonment entered

1 in *State of Washington v. Scott Allen Fischer*, Superior Court of Washington for Snohomish  
2 County Case No. 01-1-00168. Dkt. 1 at 1. Petitioner asserts two Grounds for federal habeas  
3 relief from this conviction and sentence. *Id.* at 5–8.

4 In Ground One, Petitioner alleges his vehicle, which contained crucial evidence for his  
5 conviction, was seized without a warrant in violation of the Fourth Amendment to the United  
6 States Constitution. *Id.* at 5. Petitioner asserts that, though investigators obtained signed  
7 permission to search the vehicle from Petitioner’s wife, they exceeded the scope of that consent  
8 when they removed the vehicle from Petitioner’s property to perform the search. *Id.*

9 In Ground Two, Petitioner alleges that “[t]he State fabricated false and fraudulent  
10 evidence to conceal the illegal seizure of [his] vehicle.” *Id.* at 7. He alleges that an investigator  
11 lied in a document provided to Petitioner and his trial counsel, which stated that Petitioner’s  
12 vehicle was seized pursuant to a valid warrant. *Id.* Petitioner explains he was unaware of the  
13 falsity of this statement “until recently,” which prevented him from discovering the alleged  
14 Fourth Amendment violation and from seeking suppression of evidence derived from his  
15 unlawfully seized vehicle at trial. *Id.* at 7, 13–14.

16 Petitioner previously filed a federal habeas petition challenging the same underlying state  
17 court conviction and sentence. *See Fischer v. State of Washington*, No. 2:20-cv-0051-TSZ (W.D.  
18 Wash. filed Jan. 13, 2020) (hereinafter “First Petition”). In his First Petition, Petitioner raised  
19 four grounds for relief alleging violations of the Fifth and Thirteenth Amendments and asserting  
20 that the State of Washington was in “willful defiance” of the United States Constitution. *See*  
21 *Fischer*, No. 2:20-cv-0051-TSZ, Dkt. 1 at 5–12. After concluding it was time barred under 28  
22 U.S.C. § 2244(d), the Court dismissed the First Petition *with prejudice*. *Id.* at Dkts. 5, 6.<sup>1</sup>

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24 <sup>1</sup> In dismissing the First Petition as time barred, the District Court adopted in part and modified in part the Report  
and Recommendation to dismiss the First Petition without prejudice for failure to exhaust state court remedies. *Id.* at  
Dkt. 4, 5. The District Court explained that a footnote within the Report and Recommendation, which discussed the



1 *Id.* (citing 28 U.S.C. § 2244(b)(3) and (4)). Failure to do so deprives the district court of  
 2 jurisdiction over a successive petition. *See Magwood v. Paterson*, 561 U.S. 320, 331 (2010).

### 3 III. DISCUSSION

4 The Antiterrorism and Effective Death Penalty Act (“AEDPA”) implemented a  
 5 gatekeeper function that requires successive § 2254 petitions be dismissed unless they meet one  
 6 of the exceptions outlined in 28 U.S.C. § 2244(b)(2). “The bar of successive petitions applies  
 7 only to petitions adjudicated and denied on the merits in the previous federal habeas corpus  
 8 proceeding.” *Turner v. Terhune*, 78 F. App’x 29, 30 (9th Cir. 2003) (citing *Steward v. Martinez-*  
 9 *Villareal*, 523 U.S. 637, 645 (1998)). “A disposition is ‘on the merits’ if the district court either  
 10 considers and rejects the claims or determines that the underlying claim will not be considered  
 11 by a federal court.” *McNabb v. Yates*, 576 F.3d 1028, 1029 (9th Cir. 2009) (citing *Howard v.*  
 12 *Lewis*, 905 F.3d 1318, 1322 (9th Cir. 1990)). An adjudication on the merits occurs when a  
 13 petition is dismissed with prejudice based on a defect that forecloses federal review. *McNabb*,  
 14 576 F.3d at 1029. Therefore, when a prior habeas petition is dismissed as untimely, the dismissal  
 15 results in a permanent bar on successive petitions. *Id.* at 1030.

16 Even so, “[a new] habeas petition is second or successive only if it raises claims that were  
 17 or could have been adjudicated on the merits” in the prior petition. *Id.* at 1029; *see also* 28  
 18 U.S.C. § 2244 (claims are successive and barred unless the petitioner shows the claim “relies on  
 19 a new rule of constitutional law” or “the factual predicate for the claim could not have been  
 20 discovered previously through the exercise of due diligence.”).

21 Before a petitioner is allowed to file a second or successive petition, he must obtain an  
 22 order from the Court of Appeals authorizing the district court to consider the petition. 28 U.S.C.  
 23 § 2244(b)(3); Rule 9 of the Habeas Rules; Ninth Circuit Rule 22-3; *Woods v. Carey*, 525 F.3d  
 24 886, 888 (9th Cir. 2008). In the absence of such an order authorizing review, a district court

1 lacks jurisdiction to consider a successive petition. *See Magwood*, 561 U.S. at 331; *Burton v.*  
2 *Stewart*, 549 U.S. 147, 157 (2007).

3 Accordingly, to determine whether it has jurisdiction over a potentially successive  
4 petition, the Court must assess: (1) whether the prior petition was adjudicated on the merits, (2)  
5 whether the habeas claims raised in the new petition were or could have been raised in the prior  
6 petition and (3) whether the petitioner obtained permission to file the new petition. *Id.* If the first  
7 and second questions are answered in the affirmative, the answer to the final question must also  
8 be “yes.” Otherwise, the Court lacks jurisdiction, and the successive petition must be dismissed.

9 Here, the answer to the first question is “yes”—Petitioner’s First Petition was dismissed  
10 with prejudice as time barred. *Fischer*, No. 2:20-cv-0051-TSZ at Dkt. 5; *McNabb*, 576 F.3d at  
11 1029–30. So, the Court proceeds to the second question: could Petitioner have raised the habeas  
12 claims brought in the instant Petition in his First Petition? The answer to that question is also  
13 “yes”—both Grounds for relief raised here could have been raised in the First Petition.

14 Assuming Petitioner’s vehicle was seized without a valid warrant, as alleged in Ground  
15 One, and assuming further that an investigator later lied about having a warrant, as alleged in  
16 Ground Two, Petitioner simply fails to show why either Ground could not have been raised in  
17 his First Petition. To accomplish this, Petitioner must show he was not aware of and could not  
18 have reasonably discovered information about the alleged unlawful seizure and false statement  
19 when he filed his First Petition in 2020. 28 U.S.C. § 2244; *Griffin v. Kirkpatrick*, No. 1:08-cv-  
20 00886-LJV-MJR, 2022 WL 2758003, at \*5 (W.D.N.Y. Mar. 25, 2022), *report and*  
21 *recommendation adopted*, 2022 WL 2207178 (W.D.N.Y. June 21, 2022) (noting Circuit Court  
22 denied leave to file successive petition where there was no indication factual predicate of Fourth  
23 Amendment claim was unknown or previously undiscoverable); *Younger v. Snyder*, No. 94-cv-  
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687-SLR, 1995 WL 761771, at \*5 (D. Del. Dec. 7, 1995) (dismissing Fourth Amendment claim as successive where there was no indication it could not have been brought in prior petition).

Throughout his Petition, Petitioner argues that the investigator's false statement, by design, prevented him from discovering that his vehicle was seized without a valid warrant and beyond the scope of any warrant exception obtained through his wife's consent. Dkt. 1 at 5, 7, 13–14. But within this very argument, Petitioner identifies a possible avenue for discovering the alleged falsity and unlawful seizure: by discussing the matter with his wife either during his 2001 criminal prosecution or in the decades to follow. Moreover, in a decision rejecting this same argument by Petitioner, the Washington State Supreme Court Commissioner persuasively reasoned that:

[Petitioner] asserts that a “follow-up” report by a detective falsely stated that the searched car had been seized pursuant to a warrant when in fact the warrant was for a different car. But he fails to show that any circumstances beyond his control prevented him from discovering this fact until now in the 20 plus years since his conviction. He contends he was entitled to rely on the report as true, **but this assertion begs the question of why he eventually looked into whether the document was true and why he took so long to do so.**

Dkt. 1-1 at 3 (Ruling Denying Review, Washington State Supreme Court Case No. 103382-6) (emphasis added). Because both Grounds raised in the Petition were previously discoverable and could have been raised when Petitioner filed his First Petition in 2020, the instant Petition is successive.

Therefore, the Court proceeds to the final question: did Petitioner obtain permission before filing his successive Petition? The answer is “no.” There is no allegation or evidence Petitioner obtained permission from the Ninth Circuit Court of Appeals before filing the instant Petition. Because Petitioner did not obtain leave before filing his successive Petition, this action must be dismissed for lack of jurisdiction.

#### IV. CERTIFICATE OF APPEALABILITY

A petitioner may only appeal the dismissal of their § 2254 petition after obtaining a certificate of appealability from a district or circuit judge. *See* 28 U.S.C. § (c). “A certificate of appealability may issue...only if the [petitioner] has made a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). A petitioner satisfies this standard “by demonstrating that jurists of reason could disagree with the district court’s resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.” *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003) (citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).

In this case, reasonable jurists would not debate that the Petition is successive or that it should be dismissed for lack of jurisdiction. As a result, Petitioner is not entitled to a certificate of appealability from the District Judge.

#### V. CONCLUSION

For the reasons outlined above, the Court lacks jurisdiction over Petitioner’s successive Petition. Thus, in accordance with Rule 4 of the Habeas Rules, the undersigned declines to serve the Petition and, instead, recommends this action be **DISMISSED without prejudice**. It is further recommended that a certificate of appealability be **DENIED** in this case.

Pursuant to 28 U.S.C. § 636(b)(1) and Federal Rule of Civil Procedure 72(b), the parties shall have fourteen (14) days from the service of this report to file written objections. *See also* Fed. R. Civ. P. 6. Failure to file objections will result in a waiver of those objections for purposes of *de novo* review by the District Judge, *see* 28 U.S.C. § 636(b)(1)(C), and can result in a waiver of those objections for purposes of appeal. *See Thomas v. Arn*, 474 U.S. 140, 142 (1985); *Miranda v. Anchondo*, 684 F.3d 844, 848 (9th Cir. 2012) (citations omitted). Accommodating

1 the time limit imposed by Rule 72(b), the Clerk is directed to set the matter for consideration on  
2 **May 27, 2025**, as noted in the caption.

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4 Dated this 12th day of May, 2025.

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7 Grady J. Leupold  
8 United States Magistrate Judge  
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